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No. 02-1541

In the
Supreme Court of the United States

STATE OF IOWA

Petitioner

v.

FELIPE EDGARDO TOVAR

Respondent

On Writ of Certiorari
To The Supreme Court of Iowa

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May the Iowa Supreme Court assure a voluntary and intelligent waiver of counsel by requiring the judge to advise one who pleads guilty that he has a right to be represented by counsel in making that decision, that there is a risk that in waiving counsel a viable defense may be overlooked and that by waiving an attorney, he will lose the opportunity for an independent opinion on whether it is wise to plead guilty?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of respondent Felipe Tovar's assertion of rights under the Sixth and Fourteenth Amendments. Both petitioner and respondent have granted amicus consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICUS CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned about the failure to warn a defendant pleading guilty about his right to and the value of assistance of counsel in pleading guilty.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. See Rule 37.6. The petitioner and respondent have consented to the filing of this brief, and amicus has filed the letters of consent with the Clerk of the Court, pursuant to Rule 37.3(a).

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Respondent's brief.

SUMMARY OF ARGUMENT

Legal counsel is invaluable to one considering pleading guilty to a crime. A competent attorney will investigate both the facts and the law and consider a wide range of complex issues bearing on legal guilt, punishment and collateral consequences. Since a defendant cannot knowingly waive the benefit of advice he does not know he needs, a judge should advise defendants not only of their right to counsel in considering a guilty plea but also the advantages of counsel in that process. The warnings required by the Iowa Supreme Court provide a clear and sensible solution.

Under Patterson v. Illinois, 487 U.S. 285 (1988) the scope and content of the warnings required for a valid waiver of the right to counsel vary with the stage of the proceedings and the likely impact of counsel's participation in that stage. The guilty plea stage is at the higher end of the scale of relative importance of counsel, second only to counsel at the trial stage, where extensive warnings are required per Faretta v. California, 422 U.S. 806, 835 (1976).

The plea decision will often appear deceptively simple to a defendant unaware of possible suppression issues, unaware of defenses, unaware of the vast array of possible collateral deprivations and punishments inherent in the seemingly insubstantial criminal charge. There are a multitude of considerations relevant to deciding whether it is in the defendant's interests to plead guilty. They include not only a range of issues surrounding the alternative of trial, but a starkly different range of issues surrounding the guilty plea. Most laymen cannot begin to comprehend the multitude of

considerations which only a competent attorney can be expected to know and assess. If the defendant has no lawyer, and he discusses the pros and cons of pleading guilty with any attorney, it is likely to be with his adversary, the prosecutor. Even a scrupulously fair prosecutor is no substitute for defense counsel.

A plea colloquy is no proxy for a warning about the right to and value of counsel in plea-bargaining and in deciding whether to plead guilty. The purpose of the plea colloquy is to assure that a plea is voluntary; it is not to assure that the plea is in the defendant's best interests. The role of defense counsel is far broader. Defense counsel's job is to assure that the decision to plead guilty, if made, is desirable from the defendant's perspective. To give advice on the desirability of a plea, defense counsel needs to know an array of factual and legal considerations and possible consequences unrelated to the subject matter of the plea colloquy. Collateral consequences, for example, are not even alluded to in the plea colloquy yet they are a central concern in a great many guilty plea decisions, especially those involving driving under the influence of alcohol, which can carry with them loss of drivers' licenses, civil liability for damages, disqualification for employment or professional licensing, and can elevate subsequent convictions to felonies. A first time offender is very unlikely to be aware of these risks in pleading guilty. Only his attorney is likely to inform him of them. A defendant who lacks such advice cannot make an informed decision about the desirability of pleading guilty.

Adding a few sentences of explanation of the value of an attorney to the other warnings required for a valid guilty plea imposes no significant new burdens on the system and works to assure that a knowing, intelligent waiver of counsel is made and a valid guilty plea entered. The defendant still bears the burden of proving that his waiver was not knowing or valid. The decision below does not alter traditional burdens of proof an iota.

Nor does the decision below preclude a state from attaching significance in later proceedings to convictions obtained by guilty pleas lacking effective waivers of counsel. It was stipulated by the parties below that Iowa did not attempt to -- and could not have had it wanted to -- convert a misdemeanor into a felony by relying on an invalid prior OWI conviction. Whether if a state chose to rely in some way on a conviction subject to collateral attack for ineffective waiver of counsel it could do so is plainly not before this Court, is not argued by either of the parties and should not be opined upon.

ARGUMENT

I. THE IOWA WARNINGS OR WARNINGS AT LEAST AS EFFECTIVE ARE REQUIRED UNDER THE SIXTH AMENDMENT FOR A KNOWING WAIVER OF THE RIGHT TO COUNSEL AT THE PLEA STAGE

The value of legal counsel when deciding whether to plead guilty is both great and easily overlooked by a layman. Before advising a guilty plea, a competent attorney will consider not just the facts but also a wide range of complex (and often counterintuitive) legal issues bearing on legal guilt and punishment: suppression, defenses, mens rea, likely sentencing outcomes, and future collateral consequences. Because a defendant cannot knowingly waive the benefit of advice he does not know he needs, requiring trial judges to advise defendants of the usefulness of counsel before accepting a guilty plea is fully consistent with the Sixth Amendment. The warnings imposed by the Iowa Supreme Court constitute a clear and sensible bright line rule, and should be adopted as the minimum standard for waiver of the right to counsel at the guilty plea stage under the Sixth Amendment.

A. A Knowing Waiver of the Right to Counsel at the Plea Stage Requires Specific Warnings Because Laypeople Do Not Realize that the Decision to Plead Guilty Involves Complex Legal Judgments

The purpose of the Sixth Amendment right to counsel is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 465 (1938). Any waiver of counsel during criminal proceedings must be knowingly and intelligently made, with "sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 238, 242 (1970). To ensure that the waiver is knowing, the Sixth Amendment requires that a defendant be warned of the perils of proceeding without counsel at certain key phases of the proceedings. See, e.g., Faretta v. California, 422 U.S. 806, 835 (1976) (waiver of counsel at trial).

In Patterson v. Illinois, 487 U.S. 285 (1988), the Court noted that the scope and specificity of the required warning depends on the likely impact of counsel's presence at the particular stage of the proceedings, and on the ability of a lay defendant to assess this impact on his own. Id. at 298-300. Thus, the simple *Miranda* warning is sufficient for a waiver of counsel at postindictment questioning because the attorney's role at questioning is relatively limited and the advantages of counsel obvious to the accused; yet extensive warnings are required before a defendant is permitted to proceed to trial without benefit of counsel. Id. at 299-300; Faretta, 422 U.S. at 806 (defendant must be informed of the "dangers and disadvantages of self-representation").

Waiver of counsel at the guilty plea stage is at the rigorous end of the spectrum of waiver requirements established in Patterson. An attorney plays a vital role at the plea stage by advising his client about whether it is in his interests to plead guilty. Moreover, the usefulness of counsel at the plea stage is far from obvious without specific

warnings. The types of assistance an attorney can provide, such as pointing out potential technical or legal defenses and suppression issues or informing the defendant of unexpected sentencing and collateral consequences of pleading guilty, are, by their very nature, likely to be unknown to a lay defendant.

Perhaps the most complex and difficult task a defense attorney performs is to assess his client's chances of winning at trial and to advise him about whether to plead guilty. As this Court has recognized, "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney." Brady v. United States, 397 U.S. 742, 748 n.6 (1970); see also Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) ("A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial.").

The plea decision appears deceptively simple. In most cases, however, it involves, or should involve, several judgments requiring legal expertise. What defenses are potentially available? What evidence might be subject to suppression? What mental state is required and how will the state prove it? How are the witnesses and circumstances of the case likely to be viewed by a jury? What is the likely sentence under any applicable guidelines, and is that sentence low enough to justify forgoing the defendant's right to trial? What are the collateral consequences of conviction? These are all questions that any competent lawyer will have thought about and researched before advising a defendant to plead guilty. Yet these questions, to say nothing of the answers, are not obvious to the layperson. If unrepresented by counsel, the only lawyer the accused is likely to consult is his adversary, the prosecutor. However fairminded, the prosecutor is no substitute for defense counsel.

In addition to weighing and considering an array of legal and factual issues, a defense lawyer can often eliminate by negotiation many risks and uncertainties otherwise facing

the accused. In exchange for a guilty plea, defense counsel routinely obtain sentence and charge concessions from the prosecutor that would rarely even occur to the uncounseled accused.

To suggest just a few situations where the absence of counsel would likely have a decisive impact, consider the following hypothetical cases: The defendant pleads guilty to driving while intoxicated without realizing that the results of his breathalyzer test are suppressible. An innocent defendant pleads guilty without realizing that he has an entrapment defense, a duress defense, or that his intoxication negates the specific intent required by the crime.[2] The defendant pleads guilty to what he thinks is a nonserious theft without realizing that the consideration of his relevant conduct, including uncharged or acquitted conduct, will likely lead to a sentence at the high end of the statutory range. The defendant pleads guilty to a minor felony to resolve the case quickly and get on with his life without realizing that the conviction will lead to his deportation. An attorney's role at the guilty plea stage is vital and extensive.

Absent specific warnings, the dangers of pleading guilty without counsel are not obvious. A defendant who believes himself guilty of the charges and is aware of the range of potential sentences may be under the false impression that there is nothing an attorney can do for him. This danger is all the more pressing in OWI cases such as this one, where the charges seem simple and straightforward.

The importance of an attorney at the plea stage sets this case apart from the postindictment questioning considered in Patterson. The dangers and disadvantages of

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[2] As one scholar has pointed out, "substantive criminal law contains many complexities--intent standards, jurisdictional provisions, defenses, and so forth. The defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime." William Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 830 (1989).

self-representation during interrogation are less substantial and more obvious to the accused than they are at the plea stage. As the Court noted, an attorney's role at questioning is "substantially different from the attorney's role in later phases of the criminal proceedings," id. at 294 n.6, and largely limited to advising his client to refrain from making statements to the police that could later be used against him. Id. at 193-94. Once the accused has received *Miranda* warnings, it should be clear to him what type of assistance an attorney can provide during questioning and that by waiving his right to counsel he is taking the risk that he may make damaging statements. A defendant pleading guilty, by contrast, may not be aware of the complex legal judgments that are required to adequately weigh the advantages and disadvantages of his decision.[3]

The State contends that a waiver of counsel is valid even if the defendant has an incomplete or faulty understanding of the services an attorney provides (Pet. Br. p.17-20). The State relies on cases in which this Court has found a guilty plea valid where a defendant had the benefit of competent counsel but was laboring under a misapprehension when he decided to plead guilty. See, e.g., United States v. Ruiz, 536 U.S. 622, 629-30 (1992) (defendant is unaware of impeachment evidence against State's witnesses); Brady v. United States, 397 U.S. 742, 757 (1970) (defendant "misapprehended the quality of the State's case"); McMann v. Richardson, 397 U.S. 759, 770 (1970) (counsel "misjudged the admissibility" of a confession). These cases simply hold that because the decision to plead guilty is often based on "difficult judgments," McMann at 769, and involves "unavoidable uncertainty," id., the Court will not invalidate a guilty plea simply because in retrospect "the good-faith evaluations of a reasonably competent attorney … turn out to be mistaken." Id. at 770. That a defendant who pleads guilty based on his counsel's best judgment at the time of the plea will be held to that decision if his counsel's advice later turns out to have been wrong has no bearing on whether a defendant may waive counsel if he misunderstands the role of counsel at the guilty plea stage. A valid waiver requires "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Patterson, 487 U.S. at 292 (citation omitted). A defendant who waives the right to trial and pleads guilty based on his attorney's assessment of his case is aware that there is a chance that he would be acquitted at trial and that he is foregoing that chance by pleading guilty. The defendant who waives counsel at the guilty plea stage without understanding what sorts of things an attorney can do for him at the plea stage does not understand the consequences of his decision to forgo the aid of counsel, and his waiver is therefore invalid.

[3] A valid plea colloquy contributes virtually nothing to the defendant's understanding of the importance of counsel at the plea stage. See below Section I.B.

B. A Plea Colloquy is No Substitute for a Warning About the Right to and the Value of Counsel

The State argues that a valid guilty plea colloquy is sufficient to ensure that a defendant's waiver of counsel is knowing and intelligent. Under Patterson, "an accused's waiver of his right to counsel is 'knowing' when he is made aware" of "the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." 487 U.S. 285, 298 (1988); see also id. at 292-93 (the "key inquiry" is whether the accused was "made sufficiently aware of his right to have counsel present" and "the possible consequences of a decision to forego the aid of counsel.").

The plea colloquy does not meet this standard. The advice given to Tovar by the judge in this case focused on the trial rights Tovar would be foregoing if he pled guilty. One of those rights was the assistance of counsel. Nowhere did

the judge tell Tovar that he had a right to a lawyer to assist him in plea-bargaining or in deciding whether to plead guilty or go to trial. Nor, of course, did he advise Tovar of the value of counsel in such a process.

The purpose of a plea colloquy such as is required by Iowa law is to assure that the decision to plead guilty is voluntary, i.e. free from impermissible coercion and made with a basic understanding of the direct consequences. The purpose of the assistance of counsel is much broader. Counsel not only helps assure that the plea is voluntary, counsel can also be of great value in negotiating a favorable plea-bargain. Counsel's assistance is essential to assure that the plea is prudent and desirable. When a defendant has counsel, counsel is obliged to investigate fully the facts and the law and to advise the defendant whether the proposed plea is desirable. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); Boria v. Keane, 99 F. 3d 492 (2d Cir. 1996); Model Code of Professional Responsibility EC 7-7 (1992). To fulfill those obligations, defense counsel must determine the potential collateral consequences of the conviction and explain those risks to the client. The risks vary greatly with the particular conviction in question, the biographical circumstances and lifestyle of the client and a myriad of other factors. A seemingly trivial conviction may later elevate a misdemeanor to a felony, or in any event increase, perhaps double, the potential sentence on a second conviction; may be a predicate offense on a RICO charge, see 18 U.S.C. §1961-68, or a "strike" that converts a nominal prison sentence into a life sentence, see Ewing v. California, 538 U.S. 11 (2003); may result in deportation, loss of an occupational license or exclusion from a profession. The plea colloquy conducted by the judge who accepts a guilty plea says not a word about any of these collateral consequences. See generally, Wayne LaFave & Jerold Israel, Criminal Procedure 936 (2d ed. 1992) (defendant need not be warned by the court of collateral consequences). The entire subject is ignored. Only a lawyer can fully explore potential

collateral consequences and help the defendant assess the gravity of their risk. Only a defendant who is aware of those risks can determine that a guilty plea is in his best interest. The plea colloquy is no substitute for the assistance of counsel.

C. The Iowa Warnings Establish a Clear and Sensible Minimum Requirement under the Sixth Amendment

The Sixth Amendment does not mandate a particular procedure or formulation for the required warning. Cf. Miranda v. Arizona, 384 U.S. 436, 490 (1966) ("the Constitution does not require any specific code of procedures for protecting" the privilege against self-incrimination). Nevertheless, in cases discussing the *Miranda* warnings protecting Fifth Amendment rights, this Court has repeatedly emphasized the virtues of a simple and clear bright-line rule that provides "concrete constitutional guidelines" for courts to follow. Id. at 441-42; see also, Berkemer v. McCarty, 468 U.S. 420, 430 (1984) (noting that one of "the principal advantages of the [*Miranda*] doctrine … is the clarity of that rule"); Arizona v. Roberson, 486 U.S. 675, 681 (1988) (same). This specificity "benefits the accused and the State alike." Id. Accordingly, Respondent need not justify each and every word of the Iowa warnings under the Sixth Amendment so long as they establish a clear rule that adequately protects the right to counsel while pleading guilty.

The warnings required by the Iowa Supreme Court provide a simple, clear, and sensible rule that protects defendant's right to counsel and eliminates any doubt as to what judges must do to ensure a valid waiver. The Iowa warnings require a court to advise a pro se defendant wishing to plead guilty (1) of the usefulness of an attorney; (2) that there are defenses to criminal charges that may not be known by laypersons and that without an attorney the defendant may overlook a viable defense; and (3) that an attorney may

provide an independent opinion as to whether, under the facts and applicable law, it is wise to plead guilty. State v. Tovar, 656 N.W.2d 112, 121 (2003). These warnings directly apply Patterson's requirement that a defendant understand the usefulness of counsel at the particular proceeding and the dangers of self-representation to the guilty plea procedure. Without making the judge assume the role of attorney and discuss the specific issues raised in the defendant's case, the Iowa warnings succinctly convey to the defendant that legal guilt is not necessarily the same as factual guilt in the layperson's sense, and that there is a body of technical legal rules inaccessible to a layperson that may alter the complexion of even the most superficially simple case. A defendant who proceeds to waive counsel after hearing the Iowa warnings does so "with his eyes open," Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942), and is aware that he risks overlooking information that could alter his decision to plead guilty. The Court should therefore find that the Iowa warnings constitute the minimum required under the Sixth Amendment to establish a knowing waiver of counsel while pleading guilty.[4]

II. THE DECISION OF THE COURT BELOW IMPOSES NO HEAVY BURDEN ON THE PROSECUTION

As Petitioner must concede, a valid guilty plea in Iowa requires a rather elaborate plea colloquy. Without the

[4] A finding that the Iowa warnings establish the minimum required under the Sixth Amendment would not preclude states from using other procedures to protect the defendant's rights so long as they are at least as effective as the Iowa warnings. Cf. Miranda, 384 U.S. at 467 (the *Miranda* warnings constitute a constitutional minimum but do not preclude Congress and the states from using other procedures to protect the rights of the accused so long as they are "at least as effective" as the *Miranda* warnings).

colloquy, there is no valid plea. All the decision below does is require that a few additional sentences be added regarding the right to and possible value of counsel. If the state does not record what is said to a defendant when a guilty plea is taken, or if it loses the records, the plea is already subject to a collateral attack for alleged deficiencies in the plea colloquy. The decision below does not create that problem for the prosecution, it is inherent in the failure to keep or the loss of court records. The decision below adds no significant new burdens and creates no new dangers of convictions being erroneously invalidated because of missing records. The specter of lost records raised by the NDAA is unwarranted.

Nor, as the NDAA claims, does the decision below reverse the burden of proof and require the prosecution to prove in every case that the requisite warnings were given (NDAA Br. 9). There is a presumption of regularity regarding any final conviction and the burden rests on any defendant collaterally attacking such a conviction to prove its invalidity. It will not suffice for a defendant to discover that the records of his plea colloquy cannot be found. He must affirmatively prove that the requisite waiver of counsel did not occur. There is nothing whatever in the decision of the court below that alters this traditional allocation of burdens. Indeed, there was a transcript of the proceedings when Tovar's 1996 guilty plea was received. The transcript clearly showed that no warning was given about the right to or value of counsel in connection with the guilty plea.[5] There was no alteration of the burden of proof. The burden was on Respondent and he clearly met that burden.

[5] Indeed, in Parke v. Raley, 506 U.S. 20 (1993), the Court explicitly distinguished between the case before it, in which the mere absence of a transcript was insufficient to satisfy the defendant's burden on collateral attack, and "a case in which an extant transcript is suspiciously 'silent' on whether the defendant waived constitutional rights." Id. at 30.

III. WHETHER AN INVALID WAIVER NECESSARILY MAKES A GUILTY PLEA UNUSABLE FOR FUTURE ENHANCEMENTS IS NOT BEFORE THIS COURT

The amici brief of the States of Colorado, et al., argues that even if the Iowa Supreme Court was correct in holding that warnings were required for a waiver of the right to counsel and the conviction was therefore invalid, it should still be reversed for holding that the invalid conviction could not be used for enhancement (States' Br. at 16-22). That question, however, is not before this Court. The Petition made no such claim and it is not made in Petitioner's brief. Nor was it considered below. In fact, it was stipulated away. According to the Supreme Court of Iowa, the "parties agree that a prior conviction resulting from an uncounseled guilty plea for which there was an invalid waiver of counsel may not be used to enhance a subsequent offense where the prior conviction resulted in incarceration." Appendix to Petition, at 3. The court also relied in part on state law as support for that position. Id. (citing State v. Cooper, 343 N.W.2d 485, 486 (Iowa, 1984). The amici claim that a conviction based upon a guilty plea is sufficiently reliable, without benefit of counsel or a valid waiver of counsel, to be used for enhancement purposes, e.g., to convert a misdemeanor into a felony. A number of this Court's decisions hold that prior uncounseled convictions cannot be used for collateral purposes, not even to impeach a witness. Loper v. Beto, 405 U.S. 473 (1972); see also Burgett v. Texas, 389 U.S. 109 (1967). However, Lewis v. United States, 445 U.S. 55, 67 (1980), suggests that a conviction based upon a guilty plea without a valid waiver of counsel could be used as a predicate offense for a felon-in-possession offense. That case can be distinguished because the defendant stood convicted of a felony at the time he possessed the weapon. The Court construed the statute in question to apply to

anyone possessing a weapon who at the time was convicted of a felony, whether or not that felony was subject to collateral attack. The prosecution for possessing the weapon was not the appropriate forum for collaterally attacking the prior felony. The States also rely on Custis v. United States, 511 U.S. 485, 487 (1994), which held that a federal statute could validly enhance the sentence of a person who had previously been convicted of an offense if his only attack on the validity of that conviction was ineffective assistance of counsel. The Court suggested that if the defendant had not had counsel, the conviction could not be used but that if his counsel had merely been ineffective the conviction was sufficiently reliable to be used for enhancement. Custis is therefore distinguishable because here the claim is not that counsel was ineffective; rather, it is that counsel was not there because counsel was invalidly waived.

While this Court's decisions provide little support for the States' position, it would not be entirely frivolous if asserted in a case where it was an issue. One could rationally argue that a conviction based upon an uncounseled guilty plea, although invalid and subject to collateral attack, could still be used, if a State so chose, to enhance the penalty for a subsequent crime committed prior to any challenge to the earlier conviction. But there is no evidence that Iowa is interested in enhancing sentences by relying upon invalid convictions. Nor has that issue been raised or considered below or briefed by the parties. This Court should ignore it.

CONCLUSION

For the foregoing reasons, the decision of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

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